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Guns, Originalism, and Cultural Cognition

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GUNS, ORIGINALISM, AND CULTURAL COGNITION

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"Of course, the risk of assessing evolving standards is that it is all too easy to believe that evolution has culminated in one's own views."[1]

In a legal regime whose canonical text is *Marbury v. Madison*,[2] it should be unremarkable that the Supreme Court's actions are bounded rather severely by public opinion. What makes the proposition remarkable—enough to be well worth Barry Friedman's time[3]—is also what makes *Marbury* remarkable: namely, that judges so often go out of their way to deny it. Though not unheard of, it is rare for a judge to advertise that the content of a constitutional rule she is announcing is motivated by public opinion. Such an admission would be self-defeating, since it invites the charge that she has stepped outside of her role. If public opinion determines the content of constitutional rules, then it is more difficult to defend our collective choice of judges rather than politicians or social scientists as constitutional caretakers.

The notion that judges legitimately respond to public opinion is a particularly difficult concession for those who deny that the meaning of the Constitution evolves over time. If Friedman's hypothesis is correct, it seems to put such judges to an uncomfortable choice between self-denial and public deception, between turning "faint-hearted" or being disingenuous.[4] One faced with a professed inter-

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1 Thompson v. Oklahoma, 487 U.S. 815, 865 (1988) (Scalia, J., dissenting).

2 Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

3 BARRY FREIDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION (2009).

4 Justice Scalia has famously called himself a "faint-hearted" originalist, based both on his commitment to stare decisis and on his presumed reluctance to adhere to an original understanding that conflicted diametrically with contemporary values. *See* Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 861–64 (1989) ("I cannot imagine myself, any more than any other federal judge, upholding a statute that imposes the punishment of flogging."). At least one prominent originalist scholar has argued that Scalia's originalism is undeserving of the label. *See* Randy E. Barnett, *Scalia's Infidelity: A Critique*

pretivist whose rulings appear to track evolving public opinion is tempted to invoke Judge Larry Fidler's exasperated plea to Sara Jane Olson: "Were you lying to me then or are you lying to me now?"[5]

This brief article seeks to resist the temptation in the particular context of originalism and gun rights. When the Supreme Court held in *District of Columbia v. Heller* that the Second Amendment protects an individual right to carry a handgun for self-defense, the long-standing marriage between guns and originalism was finally consummated.[6] The majority's unapologetic devotion to originalism has been well-documented.[7] On its face, Justice Scalia's opinion for the Court rests on a contested assumption about interpretation that he has spent much of his public life defending: namely, that the original meaning of constitutional text controls modern interpretation, even if that meaning has come unmoored from the purpose behind codification or is inconsistent with contemporary public values. Since the Second Amendment declares its ends in its preamble—"A well regulated militia, being necessary to the security of a free State"[8]—the *Heller* Court's disregard of purpose in favor of original meaning could not have been more transparent.[9]

At the same time, *Heller* was consistent with the prevailing political winds. A CNN poll conducted three weeks before the decision was announced found that two-thirds of Americans believed that the language of the Second Amendment protects an individual right to own a gun rather than a collective right to form a militia.[10] A more recent

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of "Faint-Hearted" Originalism, 75 U. CIN. L. REV. 7, 13 (2006) (concluding that "Justice Scalia is simply not an originalist").

5 Anna Gorman, *Olsen's Attempt to Change Plea Fails*, L.A. TIMES, Dec. 4, 2001, at 1.

6 Dist. of Columbia v. Heller, 128 S. Ct. 2783 (2008).

7 *See* Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 682–89 (2009) (discussing use of originalism in *Heller*); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191, 191 (2008) (noting that many have viewed *Heller* as "the 'Triumph of Originalism'"); J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. 253, 256–57 (2009) ("Whereas once legal conservatism demanded that judges justify decisions by reference to a number of restraining principles, *Heller* requires that they only make originalist arguments supporting their preferred view.").

8 U.S. CONST. amend. II.

9 *See* Randy E. Barnett, *News Flash: The Constitution Means What It Says*, WALL ST. J., June 27, 2008, at A13 (calling *Heller* "the finest example of what is now called 'original public meaning' jurisprudence ever adopted by the Supreme Court."). *But see* Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. REV. 1343, 1345 (2009) ("[T]he Court's reasoning is at critical points so defective—and in some respects so transparently non-originalist—that *Heller* should be seen as an embarrassment for those who joined the majority opinion.").

10 CNN/Opinion Research Corp. Poll, June 4–5, 2008, *available at* http://www.pollingreport.com/guns.htm.

survey conducted by Stephen Ansolabehere, Nathaniel Persily, and me in July 2009 found that 82 percent of Americans agreed (and 52 percent "strongly" agreed) that an individual should have a right to keep a registered handgun at home.[11] The Court's decision earned the endorsement of both major Presidential candidates at the time,[12] and the majority opinion, conspicuously and without explanation, exempted some of the most popular gun control laws from its reach.[13] For those reasons, it is tempting simply to regard *Heller* as further proof of Robert Dahl's enduring thesis—recently updated by Friedman—that "the policy views dominant on the Court are never for long out of line with the policy views dominant among the lawmaking majorities of the United States."[14] On this account, dressing the *Heller* opinion in historical garb is but one of many possible legitimation strategies that the Court regularly employs to sustain the illusion of a divide between law and politics.

We need not abandon this account, or the insights of positive political science more generally, in order to pose interesting questions about the Court's choice of methodology. An originalist opinion was not the only possible route to *Heller*'s holding, and it may not even have been the most persuasive one. The fear animating the Second Amendment at its inception was not overly aggressive crime control by the federal government, but rather federal displacement of state militias.[15] It is true that, as Justice Scalia recognized in *Heller*, and as the Court held last Term in *McDonald v. City of Chicago*,[16] the Second Amendment was widely conceptualized in individual-right terms by

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11 *See* KNOWLEDGE NETWORKS, FIELD REPORT: CONSTITUTIONAL ATTITUDES SURVEY 58 (2010) (on file with author).

12 *See* Mike Dorning, *Obama Hedges on Gun Ruling: Republicans Accuse Candidate of "Flip-Flop,"* CHI. TRIB., June 27, 2008, at 20 (reporting John McCain's response that the ruling was "a landmark victory for 2nd Amendment freedom" and Barack Obama's statement that he has "always believed that the 2nd Amendment protects the right of individuals to bear arms") (internal quotation marks omitted).

13 *See* Dist. of Columbia v. Heller, 128 S. Ct. 2783, 2816–17 (2008) ("[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.").

14 Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-maker*, 6 J. PUB. L. 279, 285 (1957); *cf.* FRIEDMAN, *supra*, note 3. *But see* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY (Nathaniel Persily et al. eds., 2008) (chronicling the disparity between public opinion and Supreme Court decisions in a range of areas).

15 *See* David Thomas Konig, *The Second Amendment: A Missing Transatlantic Context for the Historical Meaning of "the Right of the People to Keep and Bear Arms,"* 22 L. & HIST. REV. 119, 142 (2004) (discussing the fear of who would staff and control state militias present in state ratifying conventions and in Congress).

16 130 S. Ct. 3020 (2010).

the dawn of the Civil War.[17] But the *Heller* majority's effort to describe the Second Amendment in those terms as of 1791 was anachronistic and put considerable strain on the Court's reasoning. Of course, Justice Scalia and Justice Thomas are both on record as advocating an originalist interpretive approach, and so *Heller* was not an obvious occasion to abandon it, but the other three Justices in the majority are not originalists. Chief Justice Roberts, Justice Alito, or (most readily) Justice Kennedy could have acknowledged without embarrassment that their reading of the Second Amendment derived from an evolution in constitutional values.[18] Yet Roberts declined to assign the majority opinion to a nonoriginalist, and none of the Justices in the majority wrote separately to express disagreement with any aspect of Justice Scalia's opinion.

This Article argues that originalism's stubborn hold on pro-gun rights arguments may not be direct, but may instead result in part from a shared cultural orientation between originalist and gun rights proponents. That is, the appeal of deploying originalist arguments to establish a right to carry a gun may not derive from an independently persuasive account of the history of the Second Amendment. Rather, I suggest, the appeal of originalist arguments in this context derives in part from the shared cultural values of those to whom both originalist and gun rights arguments appeal. The cultural orientation that predicts attitudes in favor of gun rights significantly overlaps with the one that predicts attitudes in favor of originalism. The complex political process through which both gun rights and originalism have been pitched to the American public over the last quarter century has accordingly availed itself of a bond between the two sets of ideas that resists empirical deconstruction. Originalism is the preferred methodology, not because it supplies the best arguments, *a priori*, in favor of constitutional gun rights, but because it supplies the most resonant interpretive language through which gun rights proponents discuss the Constitution.

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17 *See id.* at 3038 ("By the 1850's, the perceived threat that had prompted the inclusion of the *Second Amendment* in the *Bill of Rights*—the fear that the National Government would disarm the universal militia—had largely faded as a popular concern, but the right to keep and bear arms was highly valued for purposes of self-defense."); *Heller*, 128 S. Ct. at 2807 ("The 19th-century cases that interpreted the Second Amendment universally support an individual right unconnected to militia service."); David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 BYU L. REV. 1359, 1447–54 (1998) (noting statements of this time period referred to the Second Amendment as an individual right).

18 *See* Jamal Greene, Heller *High Water? The Future of Originalism*, 3 HARV. L. & POL'Y REV. 325, 341–42 (2009) (stating that neither Chief Justice Roberts nor Justice Alito has demonstrated strong originalist tendencies).

My argument draws primarily on two bodies of research. First is the work of Dan Kahan and Donald Braman applying cultural theory to the debate over gun control. Kahan and Braman have argued in a series of articles that individual support for or opposition to gun control is motivated by differences in cultural worldviews.[19] To wit, individuals holding hierarchical and individualistic worldviews are far more likely to oppose gun control than individuals with respectively contrasting worldviews. Kahan and Braman argue further that the contribution of cultural orientation to policy views is such that individuals will inevitably evaluate relevant empirical evidence in accordance with, rather than independent of, those orientations.[20] One need not adopt the strong position—apparently endorsed by Kahan and Braman—that culture is entirely prior to empirical observation to believe, as I will argue, that the link between gun rights and originalism is difficult to break through even the most conscientious historical argument.

The second body of work I draw upon is the original survey research referenced earlier. In a series of surveys conducted in July 2009 and in June and July 2010, Ansolabehere, Persily, and I asked Americans about their views on constitutional interpretation, on specific constitutional issues, and on social and cultural questions. Our findings are reported more fully in a separate article,[21] but as relevant here we found that morally traditionalist and libertarian cultural orientations were highly significant predictors of a belief in originalism, predictive at higher confidence levels and yielding larger standardized coefficients than party identification, race, gender, or education level. In light of these findings, it seems that divorcing the gun rights argument from originalism may require much more than a history lesson.

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19 *See* Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. PA. L. REV. 1291, 1292 (2003) (discussing the influence of individuals' cultural worldviews on their positions on gun control). Much of Kahan and Braman's work in this area is compiled at The Cultural Cognition Project at Yale Law School, *available at* http://www.culturalcognition.net.

20 *See id.*; *see also* Donald Braman, Dan M. Kahan & James Grimmelmann, *Modeling Facts, Culture, and Cognition in the Gun Debate*, 18 SOC. J. RES. 283, 285 (2005) ("Through an overlapping set of psychological and cultural mechanisms, individuals adopt the factual beliefs that are dominant among persons who share their cultural orientations.").

21 *See* Jamal Greene, Nathaniel Persily & Stephen Ansolabehere, *Profiling Originalism*, 111 COLUM. L. REV. (forthcoming 2011) (manuscript on file with author).

I

Cultural theorists believe that individual perceptions of risk are based largely on individual cultural worldviews. Culturally contingent moral presuppositions shape our assessment of which among competing sets of risks deserve our consideration and attention. In their landmark study, Mary Douglas and Aaron Wildavsky theorized that human culture is differentiated primarily along two dimensions: a "group" dimension that reports relative levels of normative affinity for collective moral pressure, and a "grid" dimension that reports one's relative comfort with prescriptive social classification. If we view each dimension as binary, we can identify four ideal types of cultural orientation: low group, low grid ("individualists"); low group, high grid ("fatalists"); high group, low grid ("egalitarian"); and high group, high grid ("hierarchical").[22]

Individualists are libertarian and unsentimental, favoring robust competition over resources between diverse individuals unregulated either by central planning authority or prescriptive social norms. The fatalist cedes the enforcement of social norms across fixed status categories but resists group solidarity or identification. The egalitarian seeks to minimize differences in distributive outcomes, which might require strong government in the economic and political realm, but wishes to maximize opportunities for individual flourishing in the face of competing social norms, which might require weak government in the realm of public morality. The hierarchically-oriented, by contrast, is deferential to order and authority, both political and social. Roughly, egalitarian and hierarchical orientations differ across the dimension of social ordering (favoring economic and political ordering), and individualistic and fatalistic orientations differ across the dimension of economic and political ordering (opposing social ordering).

Kahan and Braman have spent the better part of a decade applying the cultural theory of risk to individual views on gun control. Drawing on the work of Douglas and Wildavsky, Karl Dake,[23] Ellen Pe-

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22 MARY DOUGLAS & AARON WILDAVSKY, RISK AND CULTURE: AN ESSAY ON THE SELECTION OF TECHNOLOGICAL AND ENVIRONMENTAL DANGERS (1982) (discussing individuals' capabilities for assessing risk).

23 Karl Dake, *Orienting Dispositions in the Perception of Risk: An Analysis of Contemporary Worldviews and Cultural Biases*, 22 J. CROSS-CULTURAL PSYCHOL. 61, 62 (1999) (arguing that mental models of risk are not solely matters of individual cognition, but also correspond to worldviews entailing deeply held beliefs and values regarding society, its functioning, and its potential fate).

ters, and Paul Slovic,[24] and on their own statistical analysis based on General Social Survey (GSS) data from 1988–2000, Kahan and Braman conclude that egalitarian and "solidaristic"[25] worldviews predict support for gun control, while hierarchical and individualistic worldviews predict opposition to gun control.[26] This is consistent with many of our intuitions and with Kahan and Braman's predicted results. In the American psyche, guns are symbols of masculinity and honor. For many, guns also connote state regulation of social nonconformists and "out" groups through violence both public—military and police forces—and private—lynchings, domestic violence, and hate crimes. At the same time, American gun culture valorizes self-reliance, as it is associated with hunting, with local as against federal authority, and with protection of home and hearth more generally. Our own research suggests (though with some notable ambiguity) that individuals who generally express satisfaction with the current level of equality in society and who believe in limited government are more likely to favor individual gun rights, controlling for demographic variation.

Standing alone, then, Kahan and Braman's findings are not wildly controversial. They leverage their observations into the more provocative claim, however, that cultural commitments precede and, indeed, commandeer data-based judgments about risk to such a degree that facts cannot change minds about gun control. This is in part because facts have the perverse, and exclusive, effect of reinforcing the views of those who need no convincing: "While predictably failing to change anyone's mind, empirical analyses *do* reinforce the conviction of those who already accept their conclusions that a rational and just

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24 Ellen Peters & Paul Slovic, *The Role of Affect and Worldviews as Orienting Dispositions in the Perception and Acceptance of Nuclear Power*, 26 J. APPLIED SOC. PSYCHOL. 1427, 1428 (1996) (noting that a person's "affective reaction" to a risk influences their cognitive perception of the risk).

25 Kahan and Braman use "solidaristic" rather than "fatalist," presumably because it better resonates and because they wish to emphasize the "group" dimension along which the individualist-solidaristic scale varies. *See* Kahan & Braman, *supra* note 18, at 1291.

26 It is important to note that Kahan and Braman's study designs coded responses along two *distinct* scales: a hierarchy-egalitarianism scale and an individualism-solidarism scale, the first roughly measuring views on social ordering and the second measuring views on political and economic ordering. Their results suggest that we can expect those who favor social ordering, *ceteris paribus*, to favor gun rights, and those who favor political and economic ordering, *ceteris paribus*, to favor gun control. As I understand Kahan and Braman's study, then, hierarchists might be more likely than egalitarians to oppose gun control, but we cannot say whether they are more or less likely to favor it than solidarists or individualists. For my purposes, this nomenclature is less important than the method through which populations are identified. *See id.*

assessment of the facts *must* support their position."[27] Kahan and Braman's data-driven (and therefore ironic) skepticism about the utility of empirical facts in resolving normative debate has prompted intense criticism which they have on various occasions sought to rebut.[28] For now, my concern is not with their thesis in its strongest variation. Let it suffice for our purposes that our cultural orientations will cause us to resist historical or social facts that point towards a competing risk assessment. This intuition is consistent with familiar accounts of cognitive dissonance.[29]

II

Judicial review is risky business. Constitutional theorists do not customarily describe the various modalities of interpretation in terms of competing bundles of risk, but they might. Judicial review in the United States entails a delegation of decision-making authority over constitutive matters of political life to elites who enjoy effective life tenure, who do not stand for election, and who purport to be guided by a two centuries-old document. Consider two possible approaches to interpretation of unclear constitutional language within such a regime. Under the first approach, a judge considers herself constrained by the set of applications that a learned man at the time of ratification would reasonably have ascribed to the text in his own time. Under the second approach, the judge considers herself bound by the principles immanent within the text and must apply them dynamically, as her own assessment of their modern application directs.

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27 Kahan & Braman, *supra* note 19, at 1321.

28 *See* Philip J. Cook & Jens Ludwig, *Fact-Free Gun Policy?*, 151 U. PA. L. REV. 1329, 1329 (2003) (arguing that while cultural worldviews may influence individuals' feelings about gun control, so does evidence on consequences of gun use); Gertrud M. Fremling & John R. Lott, Jr., *The Surprising Finding that "Cultural Worldviews" Don't Explain People's Views on Gun Control*, 151 U. PA. L. REV. 1341, 1341 (2003) (arguing that facts and evidence, in addition to cultural worldviews, affect individuals' feelings about gun control); David B. Mustard, *Culture Affects Our Beliefs About Firearms, But Data Are Also Important*, 151 U. PA. L. REV. 1387, 1387 (2003) (arguing that data as well as culture affect beliefs about firearms). *But cf.* Dan M. Kahan & Donald Braman, *Caught in the Crossfire: A Defense of the Cultural Theory of Gun-Risk Perceptions*, 151 U. PA. L. REV. 1395, 1396 (2003) (responding to critics' emphasis on the importance of data in determining gun-control opinions by reemphasizing the importance of cultural worldviews); Braman, Kahan & Grimmelmann, *supra* note 19.

29 *See* LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE 3 (1957) (arguing that cognitive dissonance is psychologically uncomfortable and will motivate an individual to reduce dissonance and achieve consonance, and that cognitive dissonance will lead to individuals avoiding situations and information which will likely increase the dissonance).

The risks attending each approach are familiar. Under the first approach, there are linguistic difficulties with ascertaining the meaning of text to fictional individuals in an age before American dictionaries. There are public choice problems of distilling collective motivations, intentions, and understandings into pronouncements featuring the certitude required of legal authority. Not least, identifying constitutional meaning with the views of slaveholders and of men who otherwise held women, Indian tribes, and commoners in low regard can (to understate) be alienating. Under the second approach, however, elite values risk supplanting public values and may depend as much on the various and shifting commitments of the swing Justice as on those of any democratically responsible institution. These bundles of risk are not randomly appreciated; they will be differentially salient across the population, and we have every reason to suspect they are driven by culture.

We can go some way towards demonstrating that empirically. We asked several originalism-related questions in our surveys. For example, we asked the following, which duplicates a series of questions asked by the Quinnipiac Polling Institute from 2003 to 2008, and again in 2010: "Which comes closer to your point of view? 1) In making decisions, the Supreme Court should only consider the original intentions of the authors of the Constitution; 2) In making decisions, the Supreme Court should consider changing times and current realities in applying the principles of the Constitution." In order to mitigate any anomalies resulting from the wording of that question, however, we also asked, for example, whether "[t]he Supreme Court should focus less on what the Constitution meant when it was written and more on the affect its decisions will have in today's America," and whether "[t]he Supreme Court should read the Constitution as a general set of principles whose meaning changes over time."[30] We used principal component factor analysis to construct an index that roughly measures one's degree of affinity for originalism. This index then became our dependent variable of greatest interest.

One might lodge a familiar objection to our survey results, and to survey data on popular attitudes towards courts more generally. It is clear that most Americans devote little attention to courts most of the time, and it would be surprising indeed to learn that phrases like "original intentions" register more than a superficial degree of com-

30 Greene, Persily & Ansolabehere, *supra* note 21 (manuscript at 9).

prehension for most Americans.[31] We take this objection not to be that Americans do not understand *what* they are being asked, but rather that they do not understand *what follows* from their answers. That is, ordinary citizens appreciate the conceptual distinction between the options posed but lack the epistemic tools to cash out what their answers portend substantively. If, as it is reasonable to suppose, people care about substantive constitutional outcomes at least as much as they do methodology, then one might conclude that responses may easily be manipulated through substantive framing. How would results change, for example, were we to reveal to respondents that the framers of the Equal Protection Clause were comfortable with affirmative action but uncomfortable with gender equality or integrated public schools?

We take up this objection at greater length in our fuller treatment of these data. The use of factor analysis reduces framing effects that might be particular to a question's wording. More broadly, the strength of the criticism depends on the use to which one wishes to put the data. I do not believe we could responsibly use our study as proof, or even as reliable evidence, that more Americans agree with Justice Breyer than with Justice Scalia on constitutional interpretation, or even that a substantial number of Americans agree with either. The question they or other informed lawyers or academics are answering is different than the one most people are answering. We take as a starting point that most respondents do not appreciate the implications of their answer for the substantive decisionmaking of the Supreme Court. Nor do we assume, however, that a particular choice of methodology—particularly at the level of generality of our study—has *any* necessary implications for substantive constitutional decisionmaking. Our hypothesis is that methodological choices are salient within the public consciousness,[32] and that rhetoric about methodology is a political commodity;[33] our modest aim is to assess how

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31 *See generally* MICHAEL X. DELLI CARPINI & SCOTT KEETER, WHAT AMERICANS KNOW ABOUT POLITICS AND WHY IT MATTERS 62–104 (1996) (arguing that what Americans know about politics involves a complicated set of questions and answers); Frederick Schauer, *The Supreme Court 2005 Term, Foreword: The Court's Agenda—and the Nation's*, 120 HARV. L. REV. 4, 12–32 (2006) (cataloging the large conceptual distance between the public agenda and the agenda of the Supreme Court). *But see* JAMES L. GIBSON & GREGORY A. CALDEIRA, CITIZENS, COURTS, AND CONFIRMATIONS: POSITIVITY THEORY AND THE JUDGMENTS OF THE AMERICAN PEOPLE 17 (2009) (arguing that the evidence of public ignorance about courts is weak).

32 The number of people answering "don't know" to the Quinnipac questions was consistently in the single digits. *See* Greene, Persily, & Ansolabehere, *supra* note 21 (manuscript at 7). This is probative of, though not identical to, salience.

33 *See generally* Greene, *supra* note 7.

the responses triggered by those choices differ across demographic and cultural space.[34]

In order to identify the cultural orientations of our respondents, we replicated a series of "values" questions that have been asked in the American National Elections Studies. Six of the questions probed views on relative levels of equality; four spoke to moral traditionalism; and three pairs of options explored views on the appropriate size of government.[35] Using factor analysis, we developed three indices: an "egalitarian" index, a "moral traditionalism" index, and a "government size" index. Our basic model is an ordinary least squares regression with the originalism index as the dependent variable.[36] The model includes a number of standard demographic variables, in addition to views on specific issues such as abortion, same-sex marriage, and gun rights.[37]

Our moral traditionalism factor and our government size factor were both significant at the .05 level. The moral traditionalism index also produced one of our largest standardized coefficients, suggesting not only confidence in its significance but substantive effects of a relatively large magnitude. Our egalitarianism factors did not achieve significance.[38]

Several theoretical explanations might support the moral traditionalism result. Most obviously, moral traditionalists resist accommodation of changes in moral standards, a risk obviated by adherence to original intentions and exacerbated by permitting social elites to adjust the Constitution to "changing times and current realities." Less obviously, perhaps, moral traditionalists may be less likely than their opposites to be skeptical of claims of absolute truth or to accept pluralism. That attitude might plausibly affect not only their views of morality but also their views of language. The notion that the same language can have radically different and yet equally valid meanings for different people at the same time may be harder to swallow for those with hierarchical rather than egalitarian orientations.

It is more difficult to say with confidence why libertarians would tend towards originalism, but at least two possibilities recommend

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34 We would also note that the cognitive objection is not limited to questions about courts, but could be lodged as to virtually any complex policy view. The efficacy of push polling, for example, does not mean that political polling is useless for all purposes, or even for its most useful purpose (predicting election results).

35 *See infra* Appendix A.

36 Logistic regression analysis generates similar patterns of significance, but does not permit use of an agreed-upon standardization of coefficients.

37 F-tests were used to test the joint insignificance of omitted variables.

38 Greene, Persily & Ansolabehere, *supra* note 21 (manuscript at 37–38).

themselves. First, originalism and libertarianism are both expressively linked to constitutional valorization. Glorifying the Constitution is not a conceptual requirement of either libertarianism or originalism, but both conventionally associate themselves with the document and celebrate its fundamental goodness.[39] Second, an orientation towards self-reliance might lead one to regard deference to the value choices of elites with suspicion. Libertarianism and democracy are sometimes thought to be opposed, as in discussions of the countermajoritarian dilemma, but there is a strand of American libertarianism that better resembles localism. Indeed, our government-size questions are more likely to tease out this orientation than conventional libertarianism. The government-size factor identifies those who would rather political and social authority rest with local insiders than with elite outsiders. Limiting the Constitution to its original expectations is a means of retaining popular control over political decisionmaking. As Robert Bork writes, "the attempt to adhere to the principles actually laid down in the historic Constitution will mean that entire ranges of problems and issues are placed off-limits for judges."[40]

III

As others have remarked, the proliferation of originalist arguments in favor of an individual rights view of the Second Amendment is a genuine paradox in light of the relative strength of non-originalist arguments supporting the same position.[41] Justice Scalia concedes, after all, that the purpose behind the Second Amendment was not to bolster or recognize an individual right to personal self-defense, but to ensure the availability of state militias.[42] And those militias were threatened not because the federal government might be overzealous about crime control, but because the new Constitution granted Congress the power "to provide for organizing, arming

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39 *See* Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 63–64 (2009) (discussing how originalism is in part a product of the degree to which Americans revere the drafters of the Constitution).

40 ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 163 (1990).

41 *See* Saul Cornell, *The Ironic Second Amendment*, 1 ALB. GOV'T L. REV. 292, 294–95 (2008) (arguing that a living constitution view of the Second Amendment, rather than an originalist view, lends the most support to an individual rights position).

42 *See* Dist. of Columbia v. Heller, 128 S. Ct. 2783, 2801 (2008) (recognizing that the Second Amendment's preamble "announces the purpose for which the right was codified: to prevent elimination of the militia").

and disciplining the militia."[43] Remarkably few contemporaneous statements during the ratifying period for the Constitution or for the Bill of Rights suggest that anyone of consequence believed the American people were raising to constitutional heights an individual right to personal self-defense.

By contrast, it is eminently reasonable to infer that the right had reached those heights by the time of the Civil War. To cite but one of many possible data points, in his floor statement introducing the Fourteenth Amendment to the Senate, Jacob Howard declared that section one of the Amendment was designed to apply against the states "the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as . . . the right to keep and bear arms."[44] Last term, the Supreme Court relied on that and other evidence to hold that the Second Amendment is incorporated against state governments.[45] Second Amendment incorporation would have been conceptually awkward at the founding, as the Amendment was designed to protect state prerogatives, but it was no longer odd by Reconstruction. Since it is unthinkable within our contemporary constitutional culture that most individual rights could bind state governments but not the federal government, it is sensible for non-originalists to consider *Heller*'s outcome perfectly justifiable as of 1868. And although the Court had never before *Heller* invalidated a gun control regulation on Second Amendment grounds, the individual rights view *simpliciter* was and remains extremely popular, and the District of Columbia's handgun ban was widely viewed as the strictest ordinance in the Nation. There is ample fodder for an opinion stating that, whatever one's view of the founding era, the Second Amendment has *become* an individual right-protecting provision that the Supreme Court must respect as such.[46]

Yet originalism has retained its hold on the Second Amendment, and Chief Justice Roberts assigned the *Heller* opinion to the Court's most notorious originalist.[47] One can easily imagine at least two po-

43 U.S. CONST. art. I, § 8, cl. 15.

44 CONG. GLOBE, 39TH CONG., 1ST SESS. 2765–66 (May 23, 1866).

45 *See* McDonald v. City of Chicago, 130 S. Ct. 3020, 3033 n.9 (2010) (citing statements by Howard, John Bingham, and Thaddeus Stevens to suggest that the Fourteenth Amendment was contemporaneously understood as incorporating the Bill of Rights).

46 *Cf.* Missouri v. Holland, 252 U.S. 416, 433 (1920) (arguing that constitutional interpretation "must be considered in the light of our whole experience and not merely in that of what was said [during the framing era]").

47 *See* Sanford Levinson, *Why Didn't the Supreme Court Take My Advice in the* Heller *Case? Some Speculative Responses to an Egocentric Question*, 60 HASTINGS L.J. 1491, 1500–02 (2009)

tential analytic progressions that might lead to a marriage of gun rights and originalism. The first progression goes: (1) originalism is the correct approach to constitutional interpretation; and (2) an originalist approach leads to the individual rights view; and therefore (3) the individual rights view is correct. This is the idealized progression of legal analysis, and I have already suggested that it is suspect standing alone. A second progression goes: (1) the individual rights view is normatively desirable; and (2) an originalist approach leads to the individual rights view; therefore, (3) originalism is correct. This is the idealized progression of much political science analysis, and again, I have suggested that it is suspect standing alone.

This paper suggests a third progression. Although our coding does not overlap precisely with that of Kahan and Braman—and indeed theirs does not map onto that of other cultural theorists[48]—the originalists in our sample have remarkably similar profiles to the gun-rights proponents in theirs. Kahan and Braman identify those with egalitarian and hierarchical orientations as most likely to oppose gun control. The GSS questions Kahan and Braman used to place respondents on their hierarchy-egalitarian scale are likely to identify moral traditionalists and libertarians as much as it is those who believe in equality as it is conventionally understood and discussed. The six questions asked about views on the death penalty, interracial marriage, same-sex intimacy, belief in traditional gender roles, and the appropriate levels of government spending on (1) "[i]mproving the conditions of Blacks" and (2) "[t]he military, armaments, and defense."[49] The GSS questions Kahan and Braman used to identify individualists, which probed views on the appropriate levels of government spending on a number of other public goods, are also likely to capture a similar population to those who score highly libertarian on our government size index.

Consider, then, the following progression: (1) I have a morally traditionalist or libertarian/localist orientation; and therefore (2) originalism is the correct approach to constitutional interpretation and the individual rights view is normatively desirable; and therefore (3) it is difficult to countenance an argument that originalism does

(wondering why Chief Justice Roberts chose an originalist to write such an important and potentially divisive opinion).

48 *See* Mary Douglas, *Being Fair to Hierarchists*, 151 U. PA. L. REV. 1349, 1349 (2003) (critiquing the use of cultural theory of risk to analyze public opinion on gun control because of the difficulties in excluding bias in developing a survey that is intended to demonstrate individual attitudes towards gun control).

49 Kahan & Braman, *supra* note 19, app. at 1326.

not support the individual rights view or that gun rights are better justified under a different approach. This progression identifies a kind of moral traditionalism or libertarianism as an omitted variable that leads the decider to support both originalism and gun rights, and recruits an account of cognitive dissonance to explain why the two go hand-in-hand. It neither adopts wholesale the fictions of traditional legal analysis, nor assumes any bad faith on the part of participants in legal debate. Under this approach, originalist supporters of the individual rights view may experience their arguments—which are not independently persuasive—as having legal integrity (as may non-originalist opponents of the individual rights view).

Participants within the conservative legal movement have, through their rhetoric, powerfully reinforced the underlying connection between gun rights and originalism. In a 1997 speech, Charlton Heston told gun owners:

> You are a casualty of the cultural warfare being waged against traditional American freedom of beliefs and ideas. . . . Rank-and-file Americans wake up every morning, increasingly bewildered and confused at why their views make them lesser citizens. After enough breakfast-table TV promos hyping tattooed sex-slaves on the next Rikki Lake show, enough gun-glutted movies and tabloid talk shows, enough revisionist history books and prime-time ridicule of religion, enough of the TV anchor who cocks her pretty head, clucks her tongue and sighs about guns causing crime and finally the message gets through: Heaven help the God-fearing, law-abiding, Caucasian, middle class, Protestant, or—even worse—NRA-card-carrying, average working stiff, or—even worse—male working stiff, because not only don't you count, you're a downright obstacle to social progress. . . .
>
> Although my years are long, I was not on hand to help pen the Bill of Rights. And popular assumptions aside, the same goes for the Ten Commandments. Yet as an American and as a man who believes in God's almighty power, I treasure both.
>
> The Constitution was handed down to guide us by a bunch of those wise old dead white guys who invented this country. Now, some flinch when I say that. Why? It's true . . . they were white guys. So were most of the guys who died in Lincoln's name opposing slavery in the 1860s. So why should I be ashamed of white guys? Why is 'Hispanic pride' or 'black pride' a good thing, while 'white pride' conjures up shaved heads and white hoods? Why was the Million Man March on Washington celebrated in the media as progress, while the Promise Keepers March on Washington was greeted with suspicion and ridicule? I'll tell you why: cultural warfare. . . .
>
> Mainstream America is depending on you—counting on you—to draw your sword and fight for them. These people have precious little time or resources to battle misguided Cinderella attitudes, the fringe propaganda of the homosexual coalition, the feminists who preach that it's a divine duty for women to hate men, blacks who raise a militant fist

> with one hand while they seek preference with the other, and all the New-Age apologists for juvenile crime, who see roving gangs as a means of adolescent merchandising, violence as a form of entertainment for impressionable minds, and gun bans as a means to lord-knows-what. We've reached that point in time when our national social policy originates on Oprah. I say it's time to pull the plug.[50]

I have quoted at some length, but even a snippet would have sufficed to get a flavor for the overriding themes: traditional morality; Christianity; race; crime-control; gender roles; anti-elitism; victimhood; self-reliance; and "rank-and-file" Americans. Heston does not, of course, speak for all gun rights proponents or all originalists. But his speech is emblematic of the message, at times subliminal and at times more overt, that joins these communities at the hip.

When we recognize originalism as an expressive idiom as much as a methodology, we can better predict its archetypal (though by no means exclusive) speakers. They are traditionalists, comfortable with inherited social stratification and suspicious of the efforts of elites both inside and outside of government to alter it. They associate deconstruction and relativism with destruction of a successful social order and loss of moral grounding. They disdain loose morals and condescension in equal measure.

CONCLUSION

This paper has offered, briefly, the end of a story, not the beginning. Culture is not exogenous to the political and social movements that affiliate with and make use of it. Linking a professional practice like originalism to a matrix of expressive values is work and requires a degree of agency. I have sought to expose the dynamics of one particular reconciliation of typically conservative instincts towards forms of constitutional originalism with Friedman's claim that the Court generally responds to public opinion. Public opinion may not only create the need for a legitimation strategy, but it may substantively engage and shape the strategy itself. The cultural orientation that social and political organizers tap into in promoting gun rights is similar to the one "methodological" entrepreneurs tap into in promoting originalism. Over time, the two outcomes may become pervasively linked in the public mind, not to mention the judicial one. Whether or not an originalist justification for individual gun rights is the best

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50 Charlton Heston, First Vice President, National Rifle Association, Speech at the Free Congress Foundation's 20th Anniversary Gala (Dec. 7, 1997), *available at* http://www.vpc.org/nrainfo/speech.html.

one, it may have been the only one the *Heller* majority could experience as true.

APPENDIX

The "equality" questions recorded levels of agreement with each of the following propositions:

- Our society should do whatever is necessary to make sure that everyone has an equal opportunity to succeed.
- We have gone too far in pushing equal rights in this country.
- One of the big problems in this country is that we don't give everyone an equal chance.
- This country would be better off if we worried less about how equal people are.
- It is not really a big problem if some people have more of a chance in life than others.
- If people were treated more equally in this country we would have many fewer problems.

The "moral traditionalism" questions recorded levels of agreement with each of the following propositions:

- The world is always changing and we should adjust our view of moral behavior to those changes.
- The newer lifestyles are contributing to the breakdown of our society.
- We should be more tolerant of people who choose to live according to their own moral standards, even if they are very different from our own.

The three pairs of "government size" questions were as follows:

- The main reason government has become bigger over the years is because it has gotten involved in things that people should do for themselves OR Government has become bigger because the problems we face have become bigger.
- We need a strong government to handle today's complex economic problems OR The free market can handle these problems without government being involved.
- The less government, the better OR There are more things that government should be doing.